THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

MBEYA DISTRICT REGISTRY

AT MBEYA

CRIMINAL APPEAL NO. 113 OF 2021

(Originating from District Court of Mbozi at Vwawa Criminal Case No. 137 of 2018 – N. L. Chami – RM)

FURAHA RAPHAEL MWASENGA ..... THE APPELLANT

VERSUS

THE REPUBLIC .....THE RESPONDENT

JUDGMENT

Date of last order: 17/05/2022

Date of judgment: 13/06/2022

NGUNYALE, J.

According to the facts, the appellant Furaha Raphael Mwasenga was engaged by David Mpembela the grandfather of the victim to take care of his cattle at Mkula Matete Mbozi district from the year 2014. He kept taking care of the cattle while staying there and he became familiar with the girl/victim whom for the purpose of hiding her identity she will be referred to as 'LCH' aged 17 years old. 'LCH' used to visit her grandfather where she met the appellant, they established sexual relationship with the appellant from 2016 till the tragedy under scrutiny. Around October 2018 the father of the victim realized that her daughter was in sexual

relationship with the appellant, he warned the appellant to stop the relationship and leave the girl to continue with her studies. By then in 2018 the girl was in form three at Msankwi Secondary School. After the warning the appellant employment could not take long, it was terminated and he returned home. On 13th day of December 2018, the appellant was arrested for the allegations of impregnating the victim 'LCD' a school girl and rape.

Following his arrest, he was charged with offences in two counts; in the first count he was charged with the offence of Rape c/s 130 (1) (2) (e) and 131 (1) of the Penal Code Cap 16 R. E 2019. It was alleged by the prosecution that the appellant is charged that on diverse dates and time between August and September 2018 at Hatete village within Mbozi District in Songwe Region unlawfully had carnal knowledge with the girl 'LCH' aged 17 years old.

In the second count the appellant was charged with the offence of Impregnating a school girl c/s 60A (3) of the Education Act Cap 353 as amended by section 22 of Written Laws (Miscellaneous Amendments) Act No. 2 of 2016. It was alleged that the appellant at different dates and time between August and September 2018 at Hatete village within Mbozi District in Songwe Region unlawfully impregnated one "LCH"

The appellant entered a plea of not guilty which automatically entertained a full trial; the trial was conducted and concluded on 15th August 2019 in favour of the respondent. The appellant was convicted as charged; he was sentenced to serve thirty years imprisonment for each count whereby the sentences were to run concurrently.

Aggrieved with conviction and sentence meted, he preferred the present appeal. During hearing of the appellant he abandoned 2nd, 3rd, 5th, 7th, 8th and 9th grounds of appeal and remained with the **first** that the offence was not proved beyond all reasonable doubt **fourth**, the trial Court erred to rely on the testimony of PW1 which was contradictory and not trustworthy and **sixth**, the trial Court erred to admit exhibit P4 the cautioned statement while no inquiry was done to establish voluntariness. Others were two supplementary grounds of appeal **one**, the trial Court erred in law and fact as it failed to remind the appellant of the charges facing him when the case came for hearing to make the trial fair and in accordance to criminal procedure and practice, **two**, the trial Court erred to admit exhibit P2 without reading the contents as required in criminal procedure and practice.

On 17th day of May 2022, the appeal was called for hearing. The appellant was represented by Ms. Febi Cheyo learned Advocate while the

respondent was represented by Ms. Hana Rose Kasambala learned state attorney. The hearing was simplified by oral submission.

Ms. Febi Cheyo argued the complaints in the first and fourth grounds of appeal together that the offence was not proved beyond reasonable doubt. The testimony of the victim of offence was contradictory and not reliable. In rape cases the true and best evidence comes from the victim but the testimony of the victim PW1 is contradictory. She said that she had sexual intercourse with the appellant around December 2018 and the doctor said that she was four months pregnant. The four months contradiction raise doubt as to whether the appellant is responsible with the pregnancy or not. The learned Counsel submitted further that PW1 said that she stopped going to school around December 2018 but the teacher who testified said that the victim never went to school from 6th November 2018. The learned Counsel was of the view that it is dangerous to rely to her evidence to ground conviction. The victim said that she started going to clinic and the hospital clinic card was written the father of the child was the appellant but the said card was never tendered in evidence.

About the sixth ground of appeal, she submitted that the caution statement was admitted without inquiry besides being objected by the

appellant. Lack of inquiry to establish voluntariness of the appellant in giving such statement faults the decision of the trial Court.

In the first ground in the supplementary grounds of appeal Ms. Cheyo submitted that it is a mandatory requirement for the Court to remind the accused his charge before starting hearing. The position is elucidated in the case of **Naoche Ole Mbile vs R** (1995) TLR 253. She said that the Court insisted that noncompliance to read the charge before hearing makes a trial a nullity. To cement the argument that noncompliance renders a trial a nullity she preferred the Court of Appeal case of **Jafari Ramadhan vs. R,** Criminal Appeal No. 311 of 2007 Mbeya Sub Registry where the Court of Appeal declared proceedings a nullity because the trial Court did not take plea before starting hearing of the case.

The second ground of appeal in the supplementary grounds of appeal the appellant complained that cautioned statement was admitted without its content being read. The exhibit ought to have been cleared before admission as it was directed in the case of **Robinson Mwanjisi & 3 Others vs R,** Criminal Appeal No (2003) TLR 48. She submitted that non reading the contents is fatal as ruled in the case of **Ally Said vs. R**, Criminal Appeal No. 308 of 2018 Court of Appeal at Dar es Salaam.

The learned State Attorney from the outset declared his stance that she does not support the appeal as filed by the appellant as it lacks merit because the offences were proved beyond all reasonable doubt. She submitted that in the offence of rape and impregnating a school girl the prosecution was to prove that there was penetration and the victim was impregnated by the appellant. The same was proved by PW1 who proved that they had sexual relationship with the appellant, the pregnancy was the result of their sexual relationship. She testified that she never had sexual intercourse with anyone other than the appellant. Ms. Kasambala relied on the best evidence rule that the true evidence of rape comes from the victim as laid in the case of **Suleiman Makumba vs R** (2006) TLR 278.

It was further submitted by the State Attorney that the testimony of the victim was corroborated by PW2 who said that after arrest the appellant made oral confession before the Hamlet Chairman. It is a legal requirement that oral confession before a person can ground conviction. On the issue of oral confession, she cited the case of **Mawaso Anyandwile Mwaikwaja vs DPP**, Criminal Appeal No. 455 of 2017 Court of Appeal at Mbeya. The appellant never cross examined PW2 about oral confession. It is settled law that non cross examination on material

issue means admission of the fact as settled in **Nyerere Nyague vs The Republic**, Criminal Appeal No. 67 of 2010. PW3 corroborated the fact that the victim was made pregnant while still a student. It was established by PW4 that she was four months pregnant. The alleged contradictions raised by the appellant's Counsel does not go to the root of the ingredients of the offence of rape.

The sixth ground of appeal on the complaint about admission of the caution statement the learned State Attorney conceded to the argument of the appellant that the same was illegally admitted because no inquiry was held when it was objected before admission. She prayed the said caution statement be expunged from the Court records.

In respect of the first ground of appeal in the supplementary grounds of appeal that the appellant was not reminded the charge before commencement of the trial she submitted that the same did not occasion any failure of justice. she said that it was true that on the date of commencement of the trial the charge was not read but it was read on the first day the appellant was arraigned before the Court and during preliminary hearing where he admitted some of the facts constituting the offences and he denied others. In such a circumstance we cannot say that he could not understand what was going on. He understood thus he asked

even questions. In the case of **Kubezya John vs The Republic**, Criminal Appeal No. 488 of 2015 Court of Appeal of Tanzania at Tabora the Court held that it was not legally obliged to read the charge before commencement of the trial. The appellant had an option to ask for the charge to be reminded.

The last ground about exhibit P2 that its content was not read in Court the learned State Attorney played the Court to expunge the said exhibit from the Court records. She submitted that expungement leaves oral evidence of the witness who tendered it intact as it was ruled in the case of **Elias Mwangoka @ Kingloli vs The Republic,** Criminal Appeal No. 96 of 2019 Court of Appeal at Mbeya, expungement of exhibits has not affected to the oral evidence on record.

The learned State Attorney prayed the Court to dismiss all the grounds of appeal and the conviction and sentence to be upheld.

In a brief rejoinder Ms. Febi Cheyo submitted that the contradiction of evidence relied by the trial Court suggests that the witness was not credible. Non tendering a clinic card proves that the case is a flamed case. About the accused being reminded the charge before commencement of the trial she insisted that the proper school of thought is mandatory for the charge to be reminded.

The Court has heard the rival submission of the parties and the records of appeal for further action of deciding the appeal. It is now to rule out whether the offence was proved beyond all reasonable doubt the cardinal principle in criminal cases or not by considering the grounds of appeal generally.

The appellant counsel raised a complaint that the offence was not proved beyond all reasonable doubt because the evidence of PW1 was surrounded with contradictions. The State Attorney was of the firm view that the offence was proved beyond all reasonable doubt because the testimony of PW1 the victim of the offence proved that she was raped and the rape was done by the appellant who also made her pregnant. Relying on the rule laid in **Suleman Makumba Case** supra she said that true evidence of rape comes from the victim, the victim proved the offences to the standard required.

The second offence charged was of impregnating a school girl. The prosecution was to prove that it is the appellant and nobody else who made her pregnant. The prosecution was to prove that it was the appellant and nobody else who made the school girl pregnant. In the case of **Peter Pilvester v. The Republic**, Criminal Appeal NO. 131 OF 2020, High Court of Tanzania at Mwanza, Tiganga, J. (as he then was) stated:

'What the prosecution was able to prove was that the victim was impregnated. It did not bring concrete evidence to prove that it was the accused, now the appellant, who caused such pregnancy. That would have best been proved by scientific evidence, and in the circumstances of the case the DNA test evidence was much appropriate to ascertain the fatherhood of the baby, which evidence, in turn would have proved a person liable for impregnating the victim. In the absence of such kind of evidence it was unsafe to find the appellant guilty of impregnating the victim.'

In the case at hand the prosecution managed to prove that the victim of the offence was pregnant, there is no doubt about that as testified by the victim and the medical doctor. In considering the evidence careful I find no evidence which prove that the appellant is the one who made her pregnant with exception of other men around. The prosecution ought to go further to prove scientific that the appellant is the person who made her pregnant. Lack of such evidence I agree with the appellants' Counsel that the offence was not proved beyond all reasonable doubt.

PW1 testified that she was raped by the appellant. Under the best evidence rule her evidence under the authority in **Suleman Makumba vs R** (supra) may ground conviction if it is established that she was a credible witness.

I am aware as I already pointed out, in sexual offences, the best evidence is that of the victim. This is the law under section 127 (6) of the Evidence Act. However, the court of appeal has emphasized on the need to evaluate

such evidence and that conviction should be entered only where the court is satisfied that victim's evidence is nothing but the truth. This was said in the case of **Mohamed Said v. The Republic**, criminal appeal No 145 of 2017 where the court of appeal said;

> *"We think that it was never intended that the word of the victim of sexual offence should be taken as gospel truth but that her or his testimony should pass the test of truthfulness. We have no doubt that justice in cases of sexual offences requires strict compliance with rules of evidence in general and S. 127 (7) of Cap. 6 in particular, and that such compliance will lead to punishing the offenders only in deserving cases."*

The victim alleged that the appellant was her boy friend and they were having sex more than ten times and they also had sexual intercourse in December 2018 and they could not use contraceptives i. e condom. PW2 the father of the victim said that around December 2018 she suspected her daughter to be pregnant because her body had some changes, she started to be fat while before she was thin. The doubts made him to instruct her mother to ask the girl. Unfortunately, the mother was not called as a witness.

The appellant's Counsel submitted that the testimony of the victim was surrounded with contradictions which make her testimony unreliable. PW1 said that she realized to be pregnant around July 2018 and the doctor PW4 said that on 13th December 2018 he detected the victim to be 5

months pregnant. In her testimony PW1 did not tell from when they started to have sexual intercourse, she just mentioned a date when she realized to be pregnant. The appellant employment was terminated immediately after the father of the victim alleged that he was having sex with her daughter the victim. The evidence is not clear as to whether termination was the result of his alleged evil act of having sex or there was another grudge against him. All these circumstances raised doubts to the Court as far as rape offence is concerned. Can we base conviction solely relying of the victim's evidence? Her testimony is shaking as correctly submitted by the defence Counsel, it cannot be accepted as a gospel truth to ground conviction basing under the authority of **Suleman Makumba vs. R** (2006) TLR 379. Considering, the circumstances of the case I am of the considered view that the testimony of PW1 alone cannot ground conviction because of the doubts as raised by the appellant.

There was a complaint from the appellant that the caution statement was admitted as Exhibit No. P2 but its content was not read in Court before it was tendered, the anomaly is fatal. The idea was conceded by the learned State Attorney that the said Exhibit P2 as tendered by PW5 was illegally admitted. After considering the scenario I agree with the position of the parties that the caution statement was erroneous admitted because it was

not cleared before admission and no inquiry was done after it was objected by the appellant during trial. The case of **Robinson Mwanjisi** supra as cited by the appellant Counsel is relevant to answer this anomaly and it provides for a relevant relief. The proper relief is to expunge it from the records as suggested by the lerned State Attoney. The learned State Attorney was of the view that expungement of the said exhibit leaves the oral evidence of PW5 intact to ground conviction. The appellants were against the view of the respondent. I think, this should not detain long the court because the best evidence in sexual offences has been found to be shaking, I find no means to rescue the situation by corroborating it with another weak evidence as it will be pronounced shortly.

The appellants complained that the appellant was not availed a fair trial because the charge was not read again before commencement of the trial. The defect was fatal and it renders the whole trial a nullity. The position was strongly opposed by the respondents' side. The learned State Attorney was of the view that during preliminary hearing the charge was read over and the appellant entered a plea of guilty, and, subsequently the facts constituting all the ingredients of the offence were read and some of them the appellant admitted and others he denied. The fact that he entered plea of not guilty and he responded to the facts, it cannot be

taken that he did not understand or he was prejudiced. He objectively understood the charge is such a way that he was able to cross examine the witnesses during trial.

I think the correct school of thought as far as reading the charge to the accused before commencement of the trial is relative depending on the circumstances of each case, it cannot be subjected to a single answer like mathematics. Having in mind of the circumstance of the present case I am of the considered view that the appellant was not prejudiced by any means because he understood the charges levelled against him as rightly submitted by the learned State Attorney and he was able to cross examine the witnesses during trial. Suppose he found that there was a need to be reminded the charge he could request it from the trial Magistrate. In the case of **Musa Mwaikunda vs. R** (2006) TLR 387 it was insisted that the important thing for fair trial the accused person must know and understand nature of the case facing him and elements of an offence. Therefore, the complaint about reading a charge before commencement of the trial has no merit because the appellant was aware of the nature and elements of the charge facing him.

At the end, it has been established that the offences against the appellant were not proved beyond all reasonable doubt the standard required in

criminal justice. Conviction in both Rape c/s 130 (1) (2) (e) and 131 (1) of the Penal Code Cap 16 R. E 2019 and of Impregnating a school girl c/s 60A (3) of the Education Act Cap 353 as amended by section 22 of Written Laws (Miscellaneous Amendments) Act No. 2 of 2016 is hereby quashed and sentence set aside. I order immediate release of the appellant **FURAHA s/o RAPHAEL MWASENGA** from prison unless lawful held with another lawful cause. Appeal allowed.

Dated at Mbeya this 13th day of June 2022.

THE HIGH COURT OF TANZANIA

D. P. Ngunyale
Judge
13/06/2022